COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 13, 2018

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Acosta:

We write to request information on the legal basis upon which the Department of Labor (DOL) has apparently determined that it is unable to prevent employers from laying off similarly employed U.S. workers and replacing them with nonimmigrant guestworkers under the H-2B program. This inquiry is predicated on recent conference calls and meetings[1] between our offices and the Department, where DOL staff has clearly stated that it is prohibited from investigating or bringing enforcement actions for violations of the nondisplacement prohibitions under the H-2B program.

The H-2B program, authorized under the Immigration and Nationality Act (INA), allows employers to hire nonimmigrant workers in temporary or seasonal non-agricultural employment if no qualified U.S. workers are available.

In administering the H-2B program, the Department of Homeland Security (DHS) relies on the Department of Labor's temporary labor certification process, which is carried out by the Office of Foreign Labor Certification (OFLC), to ensure that no qualified U.S. workers are available and the employment of H-2B workers will not adversely affect wages and working conditions for U.S. workers.

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[1] July 19 teleconference between staff for Congressman Sablan and DOL Congressional Affairs, Wage and Hour Division and Employment Training Administration; July 26 meeting in 2411 Rayburn House Office Building between Congressman Sablan and staff, House Education and Workforce Democratic staff and Assistant Secretary of Labor Katherine Brunett McGuire and Employment Training Administration officials; August 8 teleconference between Congressman Sablan staff, House Education and Workforce Democratic Staff, and Labor Department Congressional Affairs, Wage and Hour Division and Employment Training Administration.

As part of the labor certification, an employer must attest it "has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification."[2] This employer nondisplacement obligation protects both U.S. workers from being displaced and prevents exploitation of guestworkers made vulnerable by their status.

Under joint DOL/DHS regulations, DOL's Wage and Hour Division (WHD) is delegated authority to conduct investigations, including whether the employer failed to meet requirements attested to under their labor certification. OFLC has discretion to conduct audits of certifications.

As you may know, DOL recently approved a series of labor certifications for Imperial Pacific International (IPI) to hire 1,668 H-2B guestworkers to perform construction work in the Northern Marianas. According to reports, an IPI contractor, Pacific Rim Constructors, is now laying off its U.S. workforce.[3]

Through communications with DOL staff regarding this matter, it has come to our attention that it is the Department's position that is does not currently have authority to enforce nondisplacement obligations with respect to any employer, due to restrictions imposed by an appropriations rider prohibiting the enforcement of the definition of the term "corresponding employment" found in 20 CFR 655.5. [4] This interpretation appears inconsistent with the express statutory requirements in the INA.

We are encouraged that the Department has recently entered into a Memorandum of Understanding (MOU) with the Department of Justice's Civil Rights Division to help address discrimination against U.S. workers and combat visa abuse. This MOU, however, does not relieve the Department from its responsibilities to enforce nondisplacement protections. These nondisplacement protections are foundational to the DOL's role in ensuring the validity of employer representations that no qualified U.S. workers are available and the employment of H-2B workers will not adversely affect wages and working conditions for U.S. workers.

Given these concerns, please provide the following by September 30, 2018:

1. A full explanation of the Department's position regarding its ability to enforce employer nondisplacement obligations under 20 CFR 655.22(i) and 20 CFR 655.20(v), including an explanation of how the Department is interpreting "similarly employed U.S. worker" under these sections and how the Department believes its position adheres to INA section

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[2] 20 CFR § 655.20(v).
[3] Erwin Encinares, *Construction continues even with Pacific Rim workers out*, Saipan Tribune (July 27, 2018), available at https://www.saipantribune.com/index.php/construction-continues-even-with-pacific-rim-workers-out/
[4] This rider was first included in the Department of Labor Appropriations Act, 2016, Division H, Title I, Sec. 113 of Public Law 114-113. The rider states: "None of the funds in this Act shall be used to enforce the definition of corresponding employment found in 20 CFR 655.5. . . ."

101(a)(15)(H)(ii)(b). As part of this explanation, provide the date the Department adopted its nonenforcement position and suspended enforcement as a result.

2. Documents and communications that form the legal basis for the Department's position, including guidance documents, legal memorandums or opinions, letters of interpretation, or other analysis, including the application of "corresponding employment" under current regulations, and appropriations provisions prohibiting use of any funds to enforce the regulatory definition of "corresponding employment."

3. Communications among and between the DOL's Office of Solicitor, OFLC, WHD, the Office of the Secretary, and with other relevant agencies, including DHS, regarding the Department's position on employer nondisplacement obligations. Such communications should include, but not be limited to, emails, letters, faxes, and any other written materials, as well as a list of any meetings, calls, or other oral communications that took place between the aforementioned parties. In the case of meetings, calls, and other oral communications, please include the date, time, and location at which such communications took place, as well as a list of individuals who participated.

We appreciate your prompt response to this request. If you have any questions, please have your staff contact Seth Maiman with Congressman Sablan at Seth.Maiman@mail.house.gov or 202-225-2646 or Udochi Onwubiko of the Committee on Education and the Workforce Democratic Staff at Udochi. Onwubiko@mail.house.gov or 202-225-3725.

Sincerely,

GREGORIO KILILI CAMACHO SABLAN
Ranking Member
Health, Employment, Labor, and Pensions Subcommittee

ROBERT C. "BOBBY" SCOTT
Ranking Member

cc: The Honorable Kristjen M. Nielsen, Secretary, U.S. Department of Homeland Security
The Honorable L. Francis Cissna, Director, U.S. Citizenship and Immigration Services